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## JURISDICTIONAL STATEMENT

Alan Nicklasson was convicted after a jury trial in Circuit Court of St. Louis County, sitting in Lexington, Missouri, of first degree murder, Section 565.020.2 RSMo, and sentenced to death. On direct appeal, this Court affirmed the judgement and sentence and issued its Mandate on March 24, 1998. Mr. Nicklasson filed a timely *pro se* post conviction motion on June 30, 1998. Counsel was appointed by the Missouri State Public Defender's Office and filed an Amended Motion on October 25, 1998. The motion court, after a limited evidentiary hearing, denied relief on April 15, 2002. A timely Notice of Appeal was filed on May 10, 2002.

The punishment imposed in this case was death, therefore, this Court has exclusive appellate jurisdiction. *Article V, Section 3, Mo. Const. (Amended 1982).*

## Statement of Facts

### A. Procedural History

Allen Nicklasson, a mentally ill individual who was severely beaten and abused since he was an infant, was tried and convicted of capital murder in the Circuit Court of St. Louis County. That conviction and sentence were affirmed on direct appeal to this Court on March 24, 1998, *State v. Nicklasson*, 967 S.W.2d 596 (Mo. 1998).

Mr. Nicklasson initially filed a *pro se* 29.15 Motion on June 30, 1998, raising one claim of ineffective assistance of counsel. This Court appointed the Office of the Special Public Defender to represent Mr. Nicklasson on that Motion, and the undersigned was appointed by the Public Defender to act as Special Public Defender in this cause.

Counsel prepared and filed an Amended Post Conviction Motion and filed it in the Circuit Court of St. Louis County. The amended Motion contained twelve grounds for relief grouped under three general categories. The first category of claims raised the following ineffective assistance of trial counsel claims:

**Ground 1** asserted that Movant's trial attorneys conduct in intentionally distracting and preventing him from observing and participating in the trial proceedings, denied him his rights to be present at trial, to confront witnesses against him, and his rights to fundamental fairness.

**Ground 2:** asserted his Movant's trial attorneys rendered ineffective assistance of

counsel, when they failed to object to the state's closing argument where the prosecutor misstated the law by stating it did not matter whether or not Movant had a personality disorder or suffered from a mental disease or defect.

**Ground 3:** asserted ineffective assistance of counsel, when trial counsel failed to object to the court's method of conducting challenges for cause at the bench and out of Movant's hearing and presence.

**Ground 4:** asserted his trial attorneys were ineffective for failing to call Dr. William Logan and Dr. Patricia Fleming to testify at Movant suppression hearing that his Miranda waiver, and subsequent statement, was not given voluntarily.

**Ground 5:** asserted that Movant's attorneys were ineffective for refusing to allow him to testify in his own behalf.

**Ground 6:** asserted Movant's trial attorneys were ineffective for failing to call Dr. William Logan to state that Movant's mental condition was caused by mental illness and not voluntary intoxication.

The second category of claims alleged that actions of the trial court interfered with and effectively prevented Movant's attorneys from rendering effective assistance of counsel. Under that category the following claims were raised:

**Ground 7:** the trial court's order precluding attorney voir dire prevented Movant's attorney's from providing effective assistance of counsel.

**Ground 8:** This court's order precluding voir dire on other crimes evidence that this court ruled would be admissible in the penalty phase of the trial, rendered Movant's

attorneys ineffective.

Finally, the Amended Motion raised claims alleging ineffective assistance of appellate counsel.

Under that category the following claims were raised:

**Ground 9:** asserted Movant's appellate attorney rendered ineffective assistance of counsel, when he failed to include an argument in his brief regarding the admissibility of the exhibits offered at trial.

**Ground 10** asserted appellate counsel rendered ineffective assistance of counsel, when he failed to raise the issue of the court ordering Movant shackled during his entire trial, when no essential interest was served by the shackles, nor did Movant ever act out in court and the disguise utilized by the court to hide the shackles was totally ineffective and the jurors were all aware that Movant was shackled.

**Ground 11:** asserted Movant's appellate attorney rendered ineffective assistance of counsel in failing to present any argument to the appellate court in support of the point raised concerning the non-responsive and highly prejudicial testimony of Agent McComber to the effect that, in his opinion, Movant was deceitful during his confession.

**Ground 12:** asserted Movant's appellate attorney rendered ineffective assistance of counsel in failing to present any argument to the appellate court in support of the point raising the admission of Dale Lent's alleged expert testimony regarding the dominant character of the footprints recovered as this testimony did not meet even minimum standards of scientific evidence.

The state filed its Response to the Motion, arguing that Movant should be denied an evidentiary hearing on grounds 1, 3, 4, 5, 7, 8, 10. (L.F. p. 51-61). On October 3, 2000, the Motion Court denied claims 1,3,4,5,7,8, 9 and 10. (L.F. 101)

On March 19, 2002, a limited evidentiary hearing was held on the claims not previously denied. During that hearing, Movant called Patrick Berrigan, one of his trial attorneys to testify. Berrigan testified that the defense theory of the case was to present a diminished capacity defense. As such, they intended to argue that as a result of Movant's mental illness he was incapable of deliberating at the time of the commission of the crime. (Tr. 5). During the penalty phase the attorneys intended to present Movant's substantial history of medical and psychological abuse, evidence of drug abuse and mental illness. (Tr. 5).

Berrigan testified that in presenting this theory of defense to the charge of capital murder to the jury they called Dr. Logan to testify that as a result of his examinations of Movant, he believed he did not have the capacity to deliberate. (Tr. 8). Thus, according to Berrigan, if the jury had believed Dr. Logan's testimony, it would have resulted in a finding of second degree murder. (Tr. 8).

When asked why he did not object to the state's closing argument that it did not matter whether or not Movant suffered from a mental disease of defect, Berrigan stated he did not know why he did not object. (Tr. 11). Berrigan testified that in his opinion the argument misstated the law and was a clearly objectionable argument. (Tr. 11). Thus, according to Berrigan there was no strategic reason for not objecting. (Tr. 11).

At the conclusion of the hearing, the Court took the Motion under advisement and subsequently entered its Findings of Fact and Conclusions of Law denying all claims for relief.(L.F. 63) Movant filed

a timely Notice of Appeal invoking this Court's jurisdiction.(L.F. 96)



## **Points Relied On**

### **Point I**

**The Motion Court clearly erred in denying ground 2 in Movant's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Movant's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that trial counsel failed to object to the state's improper closing argument in the guilt phase of the trial when the state argued that it did not matter whether or not Movant was suffering from a mental disease or defect, when Movant presented a diminished capacity defense and presented testimony that Movant's diminished capacity prevented him from deliberating, in that the state's argument misstated the law in that whether or not Movant suffered from a mental disease or defect was relevant to his defense of diminished capacity and his ability to deliberate. Thus, there is a reasonable probability that had a proper objection been made the trial court should have declared a mis-trial and if the trial court failed to grant a mis-trial the issue would be preserved for appellate review and resulted in a reversal of Movant's conviction**

### **Point II**

**The Motion Court clearly erred in denying Movant an evidentiary hearing on ground 10 and denying the ground, because the record leaves the firm conviction that a mistake has been made, in that Movant in his Post Conviction Motion did allege facts that were not conclusively refuted by the files and records in the case and the ground raised an issue which resulted in prejudice to the Movant, in that Movant's Appellate Attorney failed to brief and argue in the Appeal that the trial court ordered, over defense objection, Movant to be shackled during the entire trial, even though during the 18 months of pre-trial proceedings Movant had never caused a disturbance in the courtroom, and the record indicated that the shackles were noticeable to the jury due to the placing of brown paper in front of defense counsel's table when the same paper was not placed in front of the prosecution's table, thus rendering Movant's Appellate Counsel's performance well below the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Movant's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in addition the Motion Court erred in failing to grant an evidentiary hearing on this issue so more evidence could have been adduced to support the fact that the shackles caused a jingling sound during the trial which further highlighted the situation, as**

**the claim was not clearly refuted by the record.**

## **Argument I**

**The Motion Court clearly erred in denying ground 2 in Movant's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Movant's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that trial counsel failed to object to the state's improper closing argument in the guilt phase of the trial when the state argued that it did not matter whether or not Movant was suffering from a mental disease or defect, when Movant presented a diminished capacity defense and presented testimony that Movant's diminished capacity prevented him from deliberating, in that the state's argument misstated the law in that whether or not Movant suffered from a mental disease or defect was relevant to his defense of diminished capacity and his ability to deliberate. Thus, there is a reasonable probability that had a proper objection been made the trial court should have declared a mis-trial and if the trial court failed to grant a mis-trial the issue would be preserved for appellate review and resulted in a reversal of Movant's conviction**

In the instant case, the prosecutor, during the guilt phase closing argument stated it did not matter whether Mr. Nicklasson suffered from a personality disorder or mental disease or defect."And

there's no doubt in anybody's mind that there is a personality disorder here. Whether that gives rise to the level of mental disease or defect doesn't matter, given the evidence that's before you." (Tr. 3322).

Not only was this argument a misstatement of the law, in light of the diminished capacity defense presented by Mr. Nicklasson, it was in direct contradiction of Jury Instruction No. 7 which stated:

If, after considering all of the evidence, including evidence that the defendant did or did not have a mental disease or defect, you have a reasonable doubt as to whether the defendant deliberated before acting, you must find the defendant not guilty of murder in the first degree.

(Instruction No. 7). It is well established that if counsel for either side misstates the law in closing argument, reversible error is committed. *State v. Watson*, 672 S.W.2d 701, 703 (Mo. App. 1984).

In the instant case, Movant's attorneys failed to object to this improper argument. Mr. Nicklasson asserts this failure constitutes ineffective assistance of counsel. The United States Court of Appeals for the Eighth Circuit has stated that the failure to object to improper comments, in a closing argument, may indicate a lack of skill and diligence on the part of that attorney. *Harris v. Housewright*, 697 F.2d 202, 210 (8th Cir. 1982).

It is inconceivable that any strategic reasons exist for Movant's attorneys failure to object. In fact, during the limited evidentiary hearing on Movant's postconviction motion, Patrick Berrigan, Movant's trial attorney, testified he had no strategic reason for not objecting, did not know why he did not object and he would not have failed to object for any strategic reason. (Tr. 5-8). Thus, the failure to object to this clearly reversible error deprived Mr. Nicklasson of the appellate review to which he was entitled to as a matter of right.

As a result, Mr. Nicklasson asserts his attorney's failure to object to the prosecutor's clear

misstatement of the law renders the attorney's representation below an objective standard of reasonableness, which was clearly prejudicial to him. As the Court stated in *State v. Watson*, 672 S.W.2d 701, 703 (Mo. App. 1984), an argument such as this, that misstates the law is reversible error. *See also State v. Jones*, 615 S.W.2d 403 (Mo. 1981). Clearly a competent attorney would have been aware of this basic principle of Missouri law and would have immediately objected to a clear misstatement of the law. Had Movant's attorney provided effective assistance of counsel and lodged a proper objection, either the trial court would have been forced to declare a mis-trial or this Court would have reviewed the merits this issue and in all likelihood would have reversed Movant conviction. For the reasons stated herein, Mr. Nicklasson asserts this Court must reverse his conviction and sentence and order a New Trial.

## Argument II

**The Motion Court clearly erred in denying Movant an evidentiary hearing on ground 10 and denying the ground, because the record leaves the firm conviction that a mistake has been made, in that Movant in his Post Conviction Motion did allege facts that were not conclusively refuted by the files and records in the case and the ground raised an issue which resulted in prejudice to the Movant, in that Movant's Appellate Attorney failed to brief and argue in the Appeal that the trial court ordered, over defense objection, Movant to be shackled during the entire trial, even though during the 18 months of pre-trial proceedings Movant had never caused a disturbance in the courtroom, and the record indicated that the shackles were noticeable to the jury due to the placing of brown paper in front of defense counsel's table when the same paper was not placed in front of the prosecution's table, thus rendering Movant's Appellate Counsel's performance well below the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Movant's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in addition the Motion Court erred in failing to grant an evidentiary hearing on this issue so more evidence could have been adduced to support the fact that the shackles caused a jingling sound during the trial which further highlighted the situation, as**

**the claim was not clearly refuted by the record.**

To be entitled to an evidentiary hearing on a motion for postconviction relief: (1) the Movant must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not conclusively refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the Movant. *Brooks v. State* 51 S.W.3d 909 (Mo. App. 2001).

In the instant case, the trial court, over defense objection, ordered Mr. Nicklasson shackled during his entire trial.<sup>1</sup> Shackles were ordered by the trial court despite the complete lack of any evidence that Movant ever caused any disruption at any court proceeding during the 18 months prior to trial.<sup>2</sup> In an effort to hide the leg irons, the court had sheets of brown paper placed in front of defense counsel's table. This measure only highlighted the problem as the prosecutor's table did not have any such cloaking device. Thus, the message sent to the jury was not subtle, but a clear signal that the court considered the accused a dangerous man, and one not to be trusted, even under the surveillance of three officers in the court room. Despite this clear violation of Movant's constitutional right to the presumption of innocence, appellate counsel failed to raise this issue on appeal. Further, this issue was cognizable on appeal as a proper objection was lodged in the trial court.

It is well established that an accused is entitled to appear before his jury unfettered unless good cause for restraints is shown. *See Lytle v. State*, 762 S.W.2d 839, 834 (Mo.App. 1988). In fact this

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<sup>1</sup>Prior to trial, the defense filed a Motion to Allow Accused to Appear in His Own Clothing and Without Restraints at Any and All Court Appearances.

<sup>2</sup>In fact, the trial court at one point during Movant hearing on his "Motion to Commit the Accused Due To Incompetency to Proceed," commented on the favorable behavior of the defendant in court, citing his communications with counsel and non-aggressiveness as evidence of his competency.



court has specifically stated that shacking should be avoided whenever possible. *State v. Brooks*, 960 S.W.2d 479 (Mo. 1991).

There was absolutely no justification for the shackles in this case, as Movant had never caused any disruption to court procedures. Nonetheless, for no justifiable reason, the court forced Mr. Nicklasson to wear leg irons throughout the trial, even when it was apparent that the leg irons were not only causing Mr. Nicklasson extreme discomfort, but could be heard jingling in the courtroom.

This practice of the trial court shackling Movant legs during his two week jury trial deprived him of his rights to due process, a fair trial, to present a defense, to effective assistance of counsel and to be free from cruel and unusual punishment as protected by the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 10, 18(a), 19, and 21 of the Missouri Constitution.*

Despite this clearly reversible error, Movant's appellate attorney failed to raise this issue in his direct appeal, thereby denying Mr. Nicklasson appellate review of this issue. Had this issue been raised, it is clear that the appellate court would have found reversible error and reversed Movant conviction and sentence. As the Supreme Court stated: handcuffing, shackling, or restraining a defendant before conviction in such a manner that a jury can see the restraint violates due process absent some "essential state interest." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986).

Jurors would naturally presume guilt and dangerousness, and that other persons in authority have already determined these facts, from such measures. *See Elledge v. Dugger*, 823 F. 2d 1439, *Amended*, 833 F. 2d 250 (11th Cir.1987), *cert. denied*, 485 U.S. 1014 (1988) (unconstitutional shackling after conviction and during capital sentencing proceeding).

Shackling is permissible only when the defendant has become "so insulting, abusive and disruptive that an orderly trial [is] made impossible," and, even then, "it is an abuse of discretion precipitously to employ shackles when less drastic security measures will adequately and reasonably suffice." *Kennedy v. Cardwell*, 487 F.2d 101, 107, 111 (6th Cir.1973), *cert denied*, 416 U.S. 959 (1974); *Illinois v. Allen*, 397 U.S. 337, 342-44 (1970) (removal from the courtroom provides a less drastic measure), *Spain v. Rushen*, 883 F.2d 712, 726-28 (9th Cir. 1989), *cert. denied*, 479 U.S. 910 (1990).

Thus, improper shackling requires automatic reversal. However, despite this clearly reversible error, this issue was not raised in Movant's direct appellate brief. It goes without question that it falls far below an objective standard of reasonableness not to raise a clearly reversible error on direct appeal. Prejudice is clear, as the above cited cases establish, shackling as was done in the instant case is automatically reversible error.

In denying this ground, the Motion court stated that Movant failed to present any evidence that the jury was aware of the shackling. (L.F. 89). The Motion Court made this finding despite the fact, the court denied an evidentiary hearing on this issue, precluding Movant from adducing evidence that the jury was aware of the shackling. Had an evidentiary hearing been granted, Movant would have presented testimony that the jingling of the shackles was readily apparent throughout the trial. Further, the Motion Court claimed Movant failed to present any evidence that appellate counsel's failure to raise this issue was unreasonable. Again, this claim was denied without an evidentiary hearing, so Movant was precluded from calling appellate counsel to the stand.

Movant asserts he was entitled to an evidentiary hearing on this claim as Movant alleged facts in

his 29.15 Motion that are not refuted by the record and it is clear that shacking resulted in prejudice to Movant. As a result, Movant asserts this Court must reverse his conviction due to the unconstitutional shacking or remand to the Motion Court for a hearing on this issue.

## **Conclusion**

Based on Points I and II this Court should reverse and judgment and remand for a new trial, or in the alternative should reverse the Judgment regarding Point II and remand for an evidentiary hearing on that issue.

Respectfully submitted,

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## **Certificate of Compliance**

I, Susan M. Hunt certify that the attached brief complies with the limitations promulgated by this Court. The brief was completed using WordPerfect 9.0, in Times New Roman size 13 point font. The brief contains 3,926 words, which does not exceed the 31,000 words allowed for and appellant's brief.

The floppy disc filed with this brief contains a copy of this brief. The disk has been scanned for viruses and is virus free.

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Susan M. Hunt

## **Certificate of Service**

I hereby certify that on this 22<sup>nd</sup> of November I mailed, postage pre-paid two copies of the forgoing brief to:

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Susan M. Hunt

